



## **Agricultural Marketing Service**

### **7 CFR Part 966**

**[Doc. No. AMS-SC-21-0016; SC21-966-1 FR]**

#### **Tomatoes Grown in Florida; Reapportionment of Membership**

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** This final rule adjusts the number of member seats apportioned to each district represented on the Florida Tomato Committee (Committee). The Department of Agriculture (USDA) is taking this action due to a 2020 amendment to the marketing order for tomatoes grown in Florida, which reduced the size of the Committee from 12 members to 10, but did not also reduce the number of member seats per district. This action changes the number of members in each of the two districts from six members and their alternates to five members and their alternates, to resolve the regulatory conflict.

**DATES:** Effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Steven W. Kauffman, Marketing Specialist, or Christian D. Nissen, Regional Director, Southeast Region Branch, Market Development Division, Specialty Crops Program, AMS, USDA; Telephone: (863) 324-3375, Fax: (863) 291-8614, or Email: [Steven.Kauffman@usda.gov](mailto:Steven.Kauffman@usda.gov) or [Christian.Nissen@usda.gov](mailto:Christian.Nissen@usda.gov).

Small businesses may request information on complying with this regulation by contacting Richard Lower, Market Development Division, Specialty Crops Program, AMS, USDA, 1400 Independence Avenue SW, STOP 0237, Washington, DC 20250-0237; Telephone: (202) 720-2491, or Email: [Richard.Lower@usda.gov](mailto:Richard.Lower@usda.gov).

**SUPPLEMENTARY INFORMATION:** This action, pursuant to 5 U.S.C. 553, amends regulations issued to carry out a marketing order as defined in 7 CFR 900.2(j). This final rule is issued under Marketing Agreement No. 125 and Order No. 966, as amended (7 CFR part 966), regulating the handling of tomatoes grown in Florida. Part 966 (referred to as the “Order”) is effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), hereinafter referred to as the "Act." The Committee locally administers the Order and is comprised of producers operating within the production area.

The Department of Agriculture (USDA) is issuing this rule in conformance with Executive Orders 12866 and 13563. Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. This action falls within a category of regulatory actions that the Office of Management and Budget (OMB) exempted from Executive Order 12866 review.

This rule has been reviewed under Executive Order 13175 – Consultation and Coordination with Indian Tribal Governments, which requires agencies to consider whether their rulemaking actions would have tribal implications. AMS has determined this rule is unlikely to have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect.

The Act provides that administrative proceedings must be exhausted before

parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may file with USDA a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with law and request a modification of the order or to be exempted therefrom. A handler is afforded the opportunity for a hearing on the petition. After the hearing, USDA would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has his or her principal place of business, has jurisdiction to review USDA's ruling on the petition, provided an action is filed not later than 20 days after the date of the entry of the ruling.

The Committee met on November 1, 2018, and February 27, 2019, to recommend changes to the Order. These recommendations included reducing the Committee size from 12 members to 10, reducing the number of districts in the production area from four districts to two, and establishing that membership on the Committee be divided evenly between the two districts. The reduction to two districts and the reapportionment of Committee membership that provided equal representation of six members in each of the newly formed districts were completed under a separate rulemaking published in the **Federal Register** on September 26, 2019 (84 FR 50711)(“2019 Amendments”).

Further amendments to the Order published in the **Federal Register** on November 16, 2020 (85 FR 72914)(“2020 Amendments”), in part, reduced total membership on the Committee from 12 members and their alternates to 10 members and their alternates under 7 CFR 966.22(a). However, 7 CFR 966.161 continued to designate six member seats and their alternates to each of the two districts, for a total of 12 members and their alternates. This rule resolves that conflict in the Order by reducing member seats in each of the two districts from six members and their alternates to five members and their alternates, maintaining equitable representation on the Committee from both districts.

Section 966.22 provides for the establishment of membership on the Committee. Ten members and their alternates shall be producers, or officers or employees of a corporate producer, in the district for which selected and a resident of the production area. Section 966.160 defines two districts from which producers serve as representatives on the Committee.

Section 966.25 provides the authority for the Committee to recommend, with the approval of the Secretary, reapportionment of members among districts, and the reestablishment of districts within the production area. Section 966.161 apportions Committee membership among the two districts pursuant to § 966.25.

During the Committee's discussions on November 1, 2018, and February 27, 2019, members indicated they wanted to establish equity in membership between the two districts. This action reduces the seats in each district from six members and their alternates to five members and their alternates to conform with the 2020 Amendments to 7 CFR 966.22(a). This will maintain equitable representation on the Committee and bring the total number of apportioned seats from two districts into compliance with the reduced number of Committee members authorized in the Order, at 7 CFR 966.22(a).

Accordingly, each district will nominate five members and five alternates for a total of 10 members and 10 alternate nominees to serve on the Committee.

### **Final Regulatory Flexibility Analysis**

Pursuant to requirements set forth in the Regulatory Flexibility Act (RFA) (5 U.S.C. 601–612), the Agricultural Marketing Service (AMS) has considered the economic impact of this rule on small entities. Accordingly, AMS has prepared this final regulatory flexibility analysis.

The purpose of the RFA is to fit regulatory actions to the scale of businesses subject to such actions in order that small businesses will not be unduly or disproportionately burdened. Marketing orders issued pursuant to the Act, and rules

issued thereunder, are unique in that they are brought about through group action of essentially small entities acting on their own behalf.

There are approximately 65 producers of Florida tomatoes in the production area and 41 handlers subject to regulation under the Order. Small agricultural producers are defined by the Small Business Administration (SBA) as those having annual receipts of less than \$1,000,000, and small agricultural service firms are defined as those whose annual receipts are less than \$30,000,000 (13 CFR 121.201).

With an estimated producer price of \$14.00 per 25-pound container, the number of Florida tomato producers, and a normal distribution assumed, the average annual producer revenue is above \$1,000,000, (\$14.00 times 22.3 million containers equal \$312,200,000, divided by 65 producers equals \$4,803,077 per producer). Thus, the majority of producers of Florida tomatoes may be classified as large entities.

According to industry and Committee data, the average annual price for fresh Florida tomatoes during the 2019–20 season was approximately \$19.07 per 25-pound container, and total fresh shipments were 22.3 million containers. Using the average price and shipment information, the number of handlers, and assuming a normal distribution, the majority of handlers have average annual receipts of less than \$30,000,000, (\$19.07 times 22.3 million containers equals \$425,261,000, divided by 41 handlers equals \$10,372,220 per handler). Thus, the majority of handlers of Florida tomatoes may be classified as small entities.

This final rule adjusts the number of member seats apportioned on the Committee. USDA is taking this action because a 2020 amendment to the Order reduced the size of the Committee from 12 members to 10, but did not simultaneously reduce member seats in each of the two districts from six members and their alternates to five members and their alternates. This conforming change revises § 966.161 pursuant to the authority in § 966.25. The balance of representation on the Committee will remain the same, with

member seats divided evenly between the two districts. Effects of this final rule should not be disproportionately greater or less for small entities than for larger entities.

It is not anticipated that this action will impose any additional costs on the industry. This change is a conforming change and will not establish any new regulatory requirements on handlers. There should be no change in financial costs, reporting, or recordkeeping requirements because of this action.

Alternatives to reapportionment were discussed and considered by the Committee. However, these alternatives were rejected. The Committee agreed that given the number of producers had decreased, reducing the Committee size would make it more reflective of today's industry. The Committee also wanted to maintain the balance of representation between the two districts. With the 2020 amendment to the Order, this action is necessary to make regulations conform to the Order requirements.

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), the Order's information collection requirements have been previously approved by OMB and assigned OMB No. 0581-0178, Vegetable and Specialty Crops. No changes are necessary in those requirements because of this action. Should any changes become necessary, they will be submitted to OMB for approval.

This final rule imposes no additional reporting or recordkeeping requirements on either small or large Florida tomato handlers. As with all Federal marketing order programs, reports and forms are periodically reviewed to reduce information requirements and duplication by industry and public sector agencies. USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this final rule.

AMS is committed to complying with the E-Government Act, to promote the use of the internet and other information technologies to provide increased opportunities for citizen access to Government information and services.

The Committee's meetings are widely publicized throughout the Florida tomato industry, and all interested persons are invited to attend meetings and participate in Committee deliberations on all issues. Like all Committee meetings, the November 1, 2018, and February 27, 2019, meetings were open to the public, and all entities, both large and small, were able to express their views on this issue.

A proposed rule concerning this action was published in the **Federal Register** on June 28, 2021 (86 FR 33913). Copies of the proposed rule were sent via email to Committee members and Florida tomato handlers. Additionally, the proposed rule was made available through the internet by USDA and the Office of the **Federal Register**. A 30-day comment period ending July 28, 2021, was provided to allow interested persons to respond to the proposal. No comments on the proposal were received. Accordingly, no changes were made to the rule as proposed.

A small business guide on complying with fruit, vegetable, and specialty crop marketing agreements and orders may be viewed at: <https://www.ams.usda.gov/rules-regulations/moa/small-businesses>. Any questions about the compliance guide should be sent to Richard Lower at the previously mentioned address in the **FOR FURTHER INFORMATION CONTACT** section.

After consideration of all relevant material presented, including the information and recommendation submitted by the Committee and other available information, it has been found that this rule will effectuate the declared policy of the Act.

#### **List of Subjects in 7 CFR Part 966**

Marketing agreements, Reporting and recordkeeping requirements, Tomatoes.

For reasons set forth in the preamble, 7 CFR part 966 is amended as follows:

#### **PART 966 – TOMATOES GROWN IN FLORIDA**

1. The authority citation for part 966 continues to read as follows:

**Authority:** 7 U.S.C. 601-674.

2. Revise § 966.161 to read as follows:

**§ 966.161 Reapportionment of Committee Membership.**

Pursuant to § 966.25, industry membership on the Florida Tomato Committee shall be reapportioned as follows:

- (a) District 1—five members and their alternates.
- (b) District 2—five members and their alternates.

Erin Morris, Associate Administrator,  
Agricultural Marketing Service.

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